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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 511

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

THE CITIZENS NATIONAL BANK IN ABILENE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS AND SUPPORTING BRIEF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS.

To the Honorable the Supreme Court of the United States:

The Supreme Court of Texas, by majority action of two judges (R. 127-134), has arbitrarily refused to enforce a plain and unambiguous contract sanctioned by statute and admittedly not in violation of any law or repugnant to public policy; it has arbitrarily changed the terms of the contract made by the parties and substituted in lieu thereof new contractual provisions under which one party is required to perform and the other is excused therefrom; and it has arbitrarily ignored the plain language of the statutes of Texas authorizing or permitting the contract in question

while invoking those statutes to support its decision; all "in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' ", *American Railway Exp. Co.*, v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641.

Summary and Short Statement of the Matter Involved.

Respondent, The Citizens National Bank in Abilene, as assignee of R. H. Locke, brought suit against petitioner, The Texas and Pacific Railway Company, to recover the balance due Locke under and subject to a construction contract with the Railway Company (R. 1-6). Petitioners Frank Parrott, Fort Worth Sand & Gravel Company, and M. M. Dawson and K. A. Browning, a partnership doing business as F. C. Crane Company, intervened and sought payment in full of their claims for materials and supplies (R. 6-10, 13-16, 10-13).

Under the contract in question, which was dated August 25, 1936, R. H. Locke agreed to perform all grading and incidental culvert work in connection with the reduction of curves at certain locations on the main line of the railway (R. 30-34). The contract specified the rates or prices to be paid, provided that the Railway's Engineer, promptly after the first of each month, should estimate the work done and determine the amount due Locke, and that the Railway Company thereupon should pay Locke the amount of such estimate, less previous payments and less fifteen per cent (R. 31-32). And paragraph 6 of the contract provided that:

> "Upon completion of the work herein provided, the Chief Engineer shall have an inspection made and if the work is complete and satisfactory, a final statement of all work done and moneys due the Contractor shall be made by the Railway Engineer, whereupon, *after the Contractor has furnished written evidence satisfactory*

to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor in connection with the work to be done hereunder, the Railway shall pay to the Contractor the full amount earned under this contract, less payments previously made, as soon as final statement can be audited and passed for voucher in the course of the Railway's business" (our italics) (R. 32).

On the same date, August 25, 1936, Locke executed in favor of the Bank an assignment, approved by the Railway Company (R. 35), reading in part as follows:

> "* * * the said R. H. Locke does hereby assign and transfer to the said Citizens National Bank, in Abilene, Texas, all sums of money now due or to become due from The Texas and Pacific Railway Company under the above-described contract, and the said R. H. Locke does hereby authorize and direct the said Citizens National Bank to collect and receive all said sums of money, and does hereby authorize and direct the said The Texas and Pacific Railway Company to make payment of all said sums of money to the said Citizens National Bank in Abilene, Texas, as said payments may become due under said contract" (R. 35).

Paragraph 6 was in the contract from its inception and the Bank knew of it or was charged with knowledge of it before and at the time it accepted the assignment. It appears from a stipulation of record (R. 30) that the Bank knew on or about August 15, 1936, ten days before its assignment from Locke, that he had been awarded the contract by the Railway Company, and the very contract before this Court was in the Bank's possession on August 25, 1936, the date it accepted the assignment (R. 36). It is not contended by the majority opinion that the Bank acquired any greater rights than Locke had.

After completion of the work, the Railway owed Locke a balance of $2,259.11 (R. 44), subject to the provisions of paragraph 6 of the contract. The Bank, as assignee of Locke, demanded this entire amount (R. 42-43) which the Railway Company refused to pay because it had notice of outstanding claims against Locke for material and supplies (R. 39-40, 41, 61-62) and because the Railway Company had not been furnished with written evidence satisfactory to it that Locke had paid in full all amounts due by him to any and all persons who performed labor or furnished materials or supplies in connection with the work done by him under the contract (R. 62). Locke, a witness for the Bank, testified on cross-examination, and it was stipulated, that Locke owes Frank Parrott a balance of $555.11 (R. 46), Fort Worth Sand & Gravel Company a balance of $175.32 (R. 49, 56), and F. C. Crane Company a balance of $137.77 (R. 48), for rental on dragline, contractor supplies, two cars of gravel, and one car of sand used by Locke in the construction work (R. 45, 46-58).

The District Court rendered judgment for the Bank (R. 28-29) and the Railway Company and the interveners appealed (R. 29). The Court of Civil Appeals for the Eleventh District of Texas reversed the judgment of the trial court, holding (1) that the contract was for the benefit of interveners and they could maintain a suit thereon, and (2) that the Railway Company had the right to withhold payment to the Bank, as assignee of Locke, until there had been compliance with the condition precedent, namely, the furnishing of written evidence, satisfactory to the Railway Company, that all laborers and materialmen had been paid (R. 68-74). On the last point, the Court of Civil Appeals said:

> "In the instant case the contract is unambiguous" (R. 69).

* * * * * * *

"The contract means the same as if it had expressly provided that the last $2,259.11 of the total amount earned under the contract should not be paid until the Contractor had paid for all labor, materials and supplies, and had furnished satisfactory written evidence of such payments" (R. 70).

* * * * * * *

"* * * we see no escape from the conclusion that the Railway Company, having refused to pay the money to the bank, was under no duty to do so, unless and until the condition subject to which the Railway Company promised to make payment was complied with.

"No basis exists for any serious contention that the Railway Company waived the condition. Consent by the Railway Company to the assignment by the Contractor of the moneys to become due under the terms of the contract neither added to, nor detracted from, the obligations and rights of the parties under the contract. The Railway Company had no right to object to the assignment of the contract, in the sense that it was assigned. It attempted to reserve in the contract no such right to object. It would be most unreasonable to hold that by consenting to the assignment, which required no consent, there was an implied novation of the terms of the contract itself.

"There being no waiver of the condition upon which payment was promised, we see no reason why the elementary rule should not apply that a conditional promise may not be enforced by the promisee without compliance with the conditions. Concrete application of this rule under similar facts are to be found in Bridgeport Mac. Co. *vs.* First Nat. Bank, 44 S. W. (2d) 414; and American Emp. Ins. Co. *vs.* Roddy (Com.), 51 S. W. (2d) 280" (R. 73).

The Bank filed an application for writ of error to the Supreme Court of Texas (R. 74-102) and despite opposition by the Railway Company and the interveners (R. 102-119, 120-127), the application was granted. The Supreme Court

reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the District Court (R. 142). We quote from the accompanying opinion:

> "We deem it important to here quote in full subdivisions 5 and 6 of the contract between Locke and the Railway. They are as follows:
>
> 'As soon as possible after the first day of each month, the Engineer shall estimate the quantities of work completed under this contract, and by applying unit prices shall determine the total work performed and the amount due the Contractor. The Railway shall as soon thereafter as such estimate can be audited and passed for voucher in the course of the Railway's business, pay the Contractor the amount of such estimate less previous payments and less fifteen (15) per cent.
>
> 'Upon completion of the work herein provided, the Chief Engineer shall have an inspection made and if the work is complete and satisfactory, a final statement of all the work done and moneys due the Contractor shall be made by the Railway Engineer, whereupon, *after the Contractor has furnished written evidence satisfactory to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor in connection with the work to be done hereunder, the Railway shall pay to the Contractor the full amount earned under this contract, less payments previously made,* as soon as final statement can be audited and passed for voucher in the course of the Railway's business' " (our italics) (R. 128).
>
> * * * * * * *
>
> "In due time Locke complied with his contract with the Railway, and the same was accepted by it. In the meantime Frank Parrott, Fort Worth Sand & Gravel Company, and F. C. Crane Company had furnished Locke with materials and machinery used in and on this project, for which Locke has never paid. It ap-

pears that the amounts respectively of such claims are: to Frank Parrott, $555.11; to Fort Worth Sand & Gravel Company, $175.32; and to F. C. Crane Company, $137.77. It also appears that on February 16, 1937, Locke owed the Bank $2,173.30, which sum, with accrued interest, is the amount of Locke's indebtedness to the Bank. It conclusively appears that none of the parties above mentioned, who furnished Locke with materials and machinery, have ever fixed, or attempted to fix, any lien against the Railway, and that when this suit was filed and tried in the district court, the time had long since passed when, under applicable statutes, any lien could be fixed against the Railway for any matter arising out of this contract'' (R. 129).

* * * * * * *

''To our minds, when this contract is viewed as a whole and in the light of the above-stated rules, and when the provision providing for final payment 'after the contractor has furnished written evidence that he has paid in full' certain named classes of persons, if read in the light of the entire contract, and in the light of our applicable lien statutes, it becomes plain that the provision of paragraph 6 of the contract, just referred to, was not intended as an absolute condition to be enforced regardless of any necessity or reason therefor; or as a contractual provision made for the benefit of third persons. To the contrary, it is evident that the provision was embraced in the contract only to protect the Railway against those who might claim liens against it under our lien statutes pertaining to railroads'' (R. 132).

By such construction, the majority opinion has changed a plain and unambiguous contract requiring that ''*all* persons'' shall be paid, into one which requires only that persons filing liens shall be paid. The contract is just as surely changed and restricted in its operation and effect as if the court had written bodily into the contract the italicized lan-

guage appearing at the end of the following quotation from paragraph 6:

> "* * * after the Contractor has furnished written evidence satisfactory to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor" *and who have filed liens against the Railway.*

And the Court justifies itself in thus refusing to enforce the contract which the parties made, and in making a new contract for them, upon the assumption that the enforcement of the contract as written by the parties "will be of no benefit to the Railway" (R. 132) and upon the further assumption that the provision in paragraph 6 "was embraced in the contract only to protect the Railway against those who might claim liens against it under our lien statutes pertaining to railroads" (R. 132). This, notwithstanding *Article 5468* of these "applicable lien statutes", called to the Court's attention (R. 112), expressly declares that "Nothing in this law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price" (Vernon's Revised Civil Statutes of Texas, 1925).

The dissenting opinion of Associate Justice Sharp discloses the arbitrary action of the majority members. We quote therefrom:

> "If there is any ambiguity whatever in the language employed by the parties, I have been unable to detect it; and the majority opinion does not point out wherein it lies. Could language be plainer, simpler, and more easy of understanding than the language of paragraph 6 above quoted? The majority opinion, to my mind assumes the issues which we must decide" (R. 137).

* * * * * * *

"But, conceding for the purpose of this opinion, that the contract was made for the benefit of the railway company alone, I ask what benefit? The majority opinion assumes the answer to that question in this language: '* * * it is evident that the provision was embraced in the contract only to protect the railway against liens which might attach to the fund retained by virtue of our applicable lien statutes.' What right have we to make that assumption? The majority opinion does not point out the 'applicable lien statutes.' Presumably the reference was intended to be Article 5452 et seq., R. C. S. 1925. To my mind one insuperable barrier to the conclusion of the majority is the very material difference between the language of Article 5452 and that employed in paragraph 6 above. The parties to this contract provided for retaining a part of the amount to be paid until evidence was furnished that payment had been made 'to any and all persons who may have performed labor or furnished materials or supplies to the contractor in connection with the work.' The statute clearly gives no lien for supplies, and to assume that the parties intended to protect from a lien when no lien was possible would hardly be warranted.

"But, be that as it may, and disregarding this apparent barrier, while still assuming that the provision was made for the benefit of the railway company alone, we return to the question, what benefit? Has a court the right to tell parties, contrary to their own construction of their own unambiguous language, that they meant certain unexpressed benefits and no others? There are many ways in which the railway company might have been benefited financially by having this retained fund applied to persons who had performed labor and furnished materials and supplies used in connection with this work. Suppose the owner, instead of being a railway company, were an individual, and that the contract related to the erection of some business house in which it was contemplated that the public would go to transact business. It is easy to per-

ceive that such owner might be greatly benefited from a commercial standpoint by the enforcement of such provision. Good will is an asset the same as physical property. Persons and firms who might otherwise become customers might well fail to do so on account of the unpleasant memories that their labor or material which entered into the building had not been paid for. Such owner might be of the opinion that he might experience some difficulty in appeasing his prospective customers by answering to them that they had waited too long to file liens, and for that reason might desire to insert the provisions of paragraph 6 in his contract. To my mind, it is a natural and altogether commendable desire on the part of an individual to make provision that persons who furnish labor and materials to erect an improvement for him should be paid therefor; and this quite irrespective of any financial gain that might flow therefrom.

"For equal reasons, a railway company would be benefited by the enforcement of the provision in question in ways other than the possible avoidance of liens. The good will of the public means much to a railway company. It is a distinct asset of its business. A railway company might well conclude that its competitors would profit by its failure to protect laborers and materialmen. Besides, if such company desires to do that, why should courts prevent it?

"No legislative authorization to insert paragraph 6 in the contract is required, but it is interesting to note that the Legislature recognized that parties might desire to afford greater protection to laborers and materialmen than that afforded by Article 5468, and accordingly provided in said Article that: '* * * Nothing in this law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price.' But after all, we get back to the simple, fundamental principle with which we started. It is not for the courts to make contracts between parties, and tell them what they meant by the use of clear

unambiguous language. Regardless of why the parties put this provision in the contract, the fact remains that it is there and that it violates no law or public policy; and it is my view that our limited duty is to enforce it as it is written" (R. 137-139).

* * * * * * *

"I think the reasons advanced in the majority opinion are unsound, and same will annul contracts authorized by law and which should be upheld" (R. 139).

* * * * * * *

"It is unquestioned that the parties had the right to make the foregoing contract. This being so, they had the right to require its fulfillment. It is not the policy of the law to bestow a right without furnishing a remedy for its enforcement. The railway company and the contractor, in plain and specific language, agreed that 'after the contractor has furnished written evidence satisfactory to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor in connection with the work done hereunder,' in that event the railway company shall pay to the contractor the full amount earned under this contract, etc. It is also unquestioned that this plain agreement was not complied with by the contractor or his assignee. The railway company admits that it holds the money, and it is willing to pay same when the contract has been complied with. The dispute as to who is entitled to the money involved in said contract is now pending in the courts for settlement. All parties claiming an interest in such fund are before the court. Courts are established to give to the parties all the relief to which they may be entitled, either in law or in equity. Certainly the railway company has the right to exact that the contract be complied with before it is compelled to pay the money. If the contractor or his assignee refuses or fails to comply with the plain terms of the contract, certainly the railway company should be per-

mitted to have its rights, as well as the rights of all parties interested therein, settled in the courts, and in such settlement obtain the relief provided by the contract, even if the money retained is applied to obtain such relief.

"Courts are not powerless to do justice in a situation like that here presented. To my mind, there can be but one disposition of this cause which will be in consonance with sound legal principles, and that is to apply this retained fund first to the payment of the claims of intervenors, and then, if any remains, to the claim of the bank" (R. 140-141).

Under the statutes of Texas, a motion for rehearing was duly filed by the Railway Company (R. 143-152), and adopted by the interveners (R. 152-153). An answer to the motions was filed by the Bank (R. 153-163), and the motions having been submitted to the court, were overruled "after due consideration of same" (R. 163).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under paragraph (b) of Section 344, Title 28, United States Code (Judicial Code, section 237, as amended) declaring:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution * * * of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *"

In the interest of brevity, we adopt by reference, as part of our jurisdictional statement, the foregoing summary and statement of the matters involved. It will be observed therefrom that the jurisdiction of this Court is predicated upon the following grounds:

The Supreme Court of Texas, by a majority opinion, has arbitrarily refused to enforce a plain and unambiguous contract sanctioned by the statutes of Texas and not violative of its laws or public policy; and that court by unwarranted construction has arbitrarily changed the terms and limited the scope and operation of such contract. In an effort to sustain its construction, the Supreme Court of Texas has imported into the case the so-called lien statutes of Texas, arbitrarily disregarding a provision in Article 5468 thereof that "nothing in this law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price" (Vernon's Revised Civil Statutes of Texas, 1925), thereby implying and in effect holding that there is something in said lien laws which deters or prevents parties from agreeing, as they did in this case, that the contractor shall pay *all* persons furnishing labor, material and supplies, whether liens are filed or not. And that court in this case has arbitrarily required the Railway Company to discharge its obligation under the contract by paying for the services performed by Locke while refusing to compel Locke, or his assignee, to discharge his obligation under the contract by furnishing the Railway, in advance of payment, with written evidence satisfactory to it, that "*all* persons" furnishing labor, materials and supplies have been paid in full. In so holding and adjudging, the Supreme Court of Texas has deprived the Railway Company of its liberty and property without due process of law and has denied it the equal protection of the law, contrary to

and in violation of Section 1 of the 14th Amendment to the Constitution of the United States; and that court has construed and applied the lien statutes of Texas in such way as to cause them to impair the obligation of the contract in question, contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States.

The aforesaid actions of the Supreme Court of Texas bring this case squarely within the rule that the Supreme Court of the United States will review the decision of a State supreme court when its "judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'," *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641.

As stated in the dissenting opinion of Associate Justice Sharp (R. 139), no legislative authority is required for making contracts like the one under consideration, but the Legislature of Texas, recognizing that parties might desire by contract to afford greater protection to laborers and materialmen than that afforded in the lien statutes, expressly declared that "nothing in this (lien) law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price" (Article 5468, Vernon's Revised Civil Statutes of Texas, 1925). Accordingly, the parties contracted that Locke, the original contractor, should receive the balance due from the Railway Company after he furnished it with satisfactory written evidence that he had paid "*all* persons" performing labor, materials or supplies (R. 32). The contract is plain and unambiguous. The Court of Civil Appeals so found (R. 69), and the dissenting Supreme Court Justice said:

"If there is any ambiguity whatever in the language employed by the parties, I have been unable to detect it; and the majority opinion does not point out wherein it lies. Could language be plainer, simpler, and more easy of understanding than the language of paragraph 6 above quoted?" (R. 137).

Such being the case, there was no occasion for the application of arbitrary rules of construction which warped the contract made by the parties, limited its scope and operation, and in fact substituted a contractual provision which they never intended. As written by the parties, the contractor was required to pay "all persons". As changed by the Court, he only has to pay those who fix liens against the Railway Company. It is small wonder that Judge Sharp said in his dissent:

"* * * conceding for the purpose of this opinion, that the contract was made for the benefit of the railway company alone, I ask what benefit? The majority opinion assumes the answer to that question in this language: '* * * it is evident that the provision was embraced in the contract only to protect the railway against liens which might attach to the fund retained by virtue of our applicable lien statutes.' What right have we to make this assumption? * * * Has a court the right to tell parties, contrary to their own construction of their own unambiguous language, that they meant certain unexpressed benefits and no others?" (R. 137-138).

* * * * * * *

"It is not for the courts to make contracts between parties, and tell them what they meant by the use of clear and unambiguous language. Regardless of why the parties put this provision in the contract, the fact remains that it is there and that it violates no law or public policy; and it is my view that our limited duty is to enforce it as it is written" (R. 139).

* * * * * * *

> "I think the reasons advanced in support of the holding in the majority opinion are unsound, and same will annul contracts authorized by law which should be upheld" (R. 139).

In exercising the above mentioned powers, it is evident that the Supreme Court of Texas has acted arbitrarily and in a manner clearly in "conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' ", *American Railway Exp. Co.* v. *Kentucky*, *supra*. As stated by Associate Justice Sharp in his dissenting opinion, the contract "violates no law or public policy" (R. 139); "it is unquestioned that the parties had the right to make the * * * contract" and "this being so they had the right to require its fulfillment. It is not the policy of the law to bestow a right without furnishing a remedy for its enforcement" (R. 140). By arbitrarily refusing to enforce the plain and unambiguous contract which the parties made, the court below clearly has deprived the Railway Company of its liberty of contract and has deprived it of a vested property right in that contract, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States. By arbitrarily changing the terms of the contract and writing new provisions requiring performance by the Railway Company and excusing performance by Locke or the Bank, the Supreme Court of Texas has deprived the Railway Company of the equal protection of the law, contrary to and in violation of Section 1 of the 14th Amendment to the Federal Constitution. By arbitrarily refusing to give effect to *Article 5468*, Vernon's Revised Civil Statutes of Texas, 1925, which authorized or permitted the making of this contract, the court below has deprived the Railway Company of its liberty and property, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United

States. And in invoking the lien statutes of Texas in aid of its refusal to enforce this contract, the Supreme Court of Texas has so construed or given effect to such statutes as to cause them to impair the obligation of the contract, contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Federal Constitution.

The foregoing statements demonstrate the substantial character of the questions presented. If the action of the Supreme Court of Texas in this case is not restrained by the Federal Constitution, then there is no limit to the power of the judiciary to break down legitimate and unambiguous contracts and to interpose and enforce in lieu thereof new contracts which individual judges might have written had they been the contracting parties. It does not require much imagination to visualize the chaotic result upon the business world.

This case was won by the Railway Company and the interveners in the Court of Civil Appeals for the Eleventh Judicial District of Texas (R. 68-74), the first appellate court to act thereon and the first court to write an opinion disclosing the basis for its action. The contract being plain and unambiguous, as found by that court (R. 69), the Railway Company had no reason to suppose that it would not be enforced according to its terms, and a new contract made for the parties, until the decision of the Supreme Court was rendered (R. 127-134). Promptly thereafter, motions for rehearing were filed in accordance with the Texas statutes (R. 143-152, 152-153). Under those statutes, a motion for rehearing is a matter of right. *Article 1762* declares that "a motion for rehearing may be filed with the clerk of the (supreme) court within fifteen days after entry of judgment or decision of the court * * *" (Vernon's Revised Civil Statutes of Texas, 1925). That statute also provides that "the grounds relied upon for the rehearing shall be distinctly specified in the motion". Articles *1763*

and *1764* require service of the motion upon opposing parties, and *Article 1765* states that the Supreme Court may hear and determine the motion at any time after five days from the return of service. The manifest purpose of the statutes is to acquaint the court with its errors and give it an opportunity to correct the same. Accordingly, the motion for rehearing by the Railway Company (R. 143-152), which was adopted by the interveners (R. 152-153), specified the errors committed, including the following:

> "The Court by construction has changed the terms and limited the scope and operation of the contract contrary to established rules of law and constitutional inhibitions" (R. 144).
>
> * * * * * * *
>
> "The decision and judgment of the Court deprives this defendant of its liberty and property without due process of law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States" (R. 144).
>
> * * * * * * *
>
> "As now interpreted and applied by the Court, the lien statutes of Texas impair the obligation of the contract contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States" (R. 144).
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> * * * * * * *
>
> "We shall endeavor to show that the Court has departed from proper and long established principles of law and that under the majority opinion the contract in question is changed and limited by construction, the obligation of the contract is impaired, and this defendant is denied due process of law and equal protection of the law, all in violation of and contrary to the Constitutions of Texas and of the United States" (R. 143).
>
> * * * * * * *

"Furthermore, the Court by its decision and judgment requires this defendant to discharge its contractual obligation by paying 'for the services performed by Locke' * * * and at the same time the Court refuses to compel Locke, or his assignee, to discharge his contractual obligation to furnish the Railway, in advance of payment, written evidence satisfactory to it, that '*all* persons' furnishing labor, materials and supplies have been paid in full. By all of such actions the Court has deprived this defendant of its liberty, property, privileges and immunities, without due course of law and without due process of law, and the Court has denied to this defendant (Railway Company) the equal rights and the equal protection of the law * * * contrary to and in violation of the 5th and 14th Amendments to the Constitution of the United States. And the Court has given an operative effect to the lien statutes of this State which causes them to impair the obligation of the contract * * * contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States" (R. 149-150).

An answer to the motions was filed by the Bank (R. 153-163), and the motions, having been submitted to the Court, were overruled "after due consideration of same" (R. 163).

Questions Presented.

The following questions are presented by this application:

1. Does the arbitrary refusal of the State supreme court to enforce the plain and unambiguous terms of the contract violate the due process clause of the 14th Amendment of the Federal Constitution?

2. Does the arbitrary action of the State supreme court in changing, by unwarranted construction, the plain and unambiguous terms of the contract so that one litigant must

perform its obligation and the other is excused therefrom, violate the equal protection clause of the Federal Constitution?

3. Is it arbitrary action, violative of the due process clause of the 14th Amendment to the Federal Constitution, for a State supreme court to invoke, in aid of its refusal to enforce a plain and unambiguous contract, State statutes which expressly recognize that such contract may be made?

4. Is the obligation of a contract impaired by State statutes in effect when the contract was made, when they subsequently are used by a State supreme court in aid of its refusal to enforce the plain and unambiguous terms of the contract?

5. Is it a violation of the due process clause of the Federal Constitution for the Supreme Court of the State to deprive a party to the contract of the right to fix the time for the payment of an obligation provided in the contract when the Legislature of the State expressly authorizes the very type of provision contained in the contract, the action of the State court at one sweep depriving a party of a right not only expressly given by contract but likewise by statute as well?

Reasons Relied On for Allowance of Writ.

The Supreme Court of Texas has held in substance and effect that:

> There is no violation of the due process clause of the 14th Amendment to the Federal Constitution when it arbitrarily refuses to enforce the plain and unambiguous terms of a contract which is sanctioned by statute and does not violate any law or public policy of the State;
>
> There is no violation of the due process or equal protection clauses of the 14th Amendment to the Federal

Constitution when it arbitrarily changes by construction a plain and unambiguous contract which the parties have made and substitutes therefor new and different contractual provisions under which one party is compelled to perform the obligation previously assumed and the other party is excused therefrom;

It may disregard that portion of a state statute recognizing that a given contract may be made and invoke the balance thereof in aid of its refusal to enforce a plain and unambiguous contract without violating the due process clause of the 14th Amendment to the Constitution; and

It may use state statutes, in effect prior to the execution of a contract, in aid of its refusal to enforce the plain and unambiguous terms of the contract, without causing those statutes to impair the obligation of the contract under Clause 1 of Section 10 of Article 1 of the Constitution of the United States.

Each of these holdings violates the respective provisions of the Federal Constitution, and they either are in conflict with applicable decisions of this Court or present Federal questions of substance not heretofore specifically determined by this Court.

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Texas, at Austin, Texas, commanding that court to certify and send to this Court for review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings in the case on its docket numbered 7580 and entitled "The Citizens National Bank in Abilene *v.* The Texas and Pacific Railway Company, et al.," and that the judgment of the Supreme Court of the State of Texas be reversed by this Honorable Court, and that your petitioner

may have such other and further relief to which it may be entitled; for all of which your petitioner will ever pray.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By WAGSTAFF, HARWELL, DOUTHIT & ALVIS,
Abilene, Texas;
R. S. SHAPARD,
S. W. LANCASTER,
M. E. CLINTON,
Texas and Pacific Bldg.,
Dallas, Texas,
Counsel for Petitioner.

Frank Parrott, M. M. Dawson and K. A. Browning doing business as a co-partnership under the trade name of F. C. Crane Company, and Fort Worth Sand & Gravel Company, a Texas corporation, hereby adopt the foregoing petition for writ of certiorari and urge that it be granted on their behalf as well as for the Railway Company.

GUTHRIE & GUTHRIE,
R. L. GUTHRIE,
Counsel for the Above,
Mentioned Parties,
Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 511

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,

Petitioners,

vs.

THE CITIZENS NATIONAL BANK IN ABILENE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The opinion of the Court of Civil Appeals for the Eleventh District of Texas is reported on pages 765 to 769, inclusive, of Volume 126 of the Southwestern Reporter, 2d Series.

The majority and dissenting opinions in the Supreme Court of the State of Texas are reported on pages 1003-1008 and 1008-1011, respectively, of Volume 150 of the Southwestern Reporter, 2d Series, advance sheets.

Grounds of Jurisdiction.

In the interest of brevity, we adopt the "Jurisdictional Statement" appearing in the foregoing petition for writ of certiorari.

The majority and dissenting opinions, also the judgment, in the Supreme Court of Texas were filed on March 19, 1941 (R. 127, 134, 142). Timely motions for rehearing were filed under *Article 1762,* Vernon's Revised Civil Statutes of Texas, 1925 (R. 143, 152). "After due consideration", these motions were overruled on May 14, 1941 (R. 163).

Jurisdiction of this Court is invoked under paragraph (b) of Section 344 of Title 28 of the United States Code (Judicial Code, section 237, as amended).

The Supreme Court of Texas, by a majority opinion, has arbitrarily refused to enforce the plain and unambiguous contract made by the parties, sanctioned by statute and violative of no law or public policy, thereby depriving the Railway Company of its liberty and property, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

The Supreme Court of Texas, by a majority opinion, has arbitrarily changed the terms of a contract between the parties and has written new provisions for them requiring performance by the Railway Company and excusing performance by Locke or the Bank, thereby depriving the Railway Company of the equal protection of the law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

The Supreme Court of Texas, by a majority opinion, has arbitrarily refused to give effect to *Article 5468,* Vernon's Revised Civil Statutes of Texas, which authorized or permitted the making of the contract before the court, thereby depriving the Railway Company of its liberty and property, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

The Supreme Court of Texas, by a majority opinion, has arbitrarily invoked the lien statutes of Texas in aid of its refusal to enforce the contract between the parties and has so construed or given effect to such statutes as to cause

them to impair the obligation of the contract, contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States.

The aforementioned actions of the majority of the Supreme Court of Texas, and each of them, are in "clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'," *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641.

In accordance with *Article 1762*, Vernon's Revised Civil Statutes of Texas, 1925, requiring grounds to be specified, the foregoing errors were set forth in motions for rehearing (R. 143-152, 152-153), when they became apparent from the majority opinion of the Supreme Court of Texas. "After due consideration" by that court, the motions were overruled (R. 163).

Statement of the Case.

In the interest of brevity, we adopt as our statement of the case the "Summary and Short Statement of the Matter Involved" appearing in the foregoing petition for writ of certiorari.

Specification of Errors.

1. The Supreme Court of Texas erred in refusing to enforce the plain and unambiguous contract made by the parties, sanctioned by statute and violative of no law or public policy, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

2. The Supreme Court of Texas erred in changing the terms of the contract between the parties and in writing new provisions for them requiring performance by the Rail-

way Company and excusing performance by Locke or the Bank, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

3. The Supreme Court of Texas erred in refusing to give effect to *Article 5468*, Vernon's Revised Civil Statutes of Texas, which authorized or permitted the making of the contract between the parties, thereby depriving the Railway Company of its liberty and property contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

4. The Supreme Court of Texas erred in invoking the lien statutes of Texas in aid of its refusal to enforce the contract between the parties, and in so construing or giving effect to those statutes as to cause them to impair the obligation of the contract, contrary to and in violation of Clause 1 of Section 10 of Article 1 of the Constitution of the United States.

ARGUMENT.

This argument is in itself a summary.

This is not a case of mere erroneous decision by a State supreme court. As stated in the introductory paragraph to the foregoing petition for writ of error, the Supreme Court of Texas, by majority action of two judges (R. 127-134), has arbitrarily refused to enforce a plain and unambiguous contract which is sanctioned by statute and is not in violation of any law or repugnant to public policy; it has arbitrarily changed the terms of the contract made by the parties and substituted in lieu thereof new contractual provisions under which one party is required to perform its obligations and the other party is excused thereform; and it has arbitrarily ignored the plain language of a statute of Texas, authorizing or permitting the contract in question, while invoking other statutes to support its decision.

All such action manifestly is in "clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'," *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641.

To the decision of the majority, the remaining Supreme Court Justice dissented vigorously (R. 134-141). The case received widespread attention and was the subject of an article in the Texas Law Review, June 1941 issue, pages 509-510, which approved the dissenting opinion. A copy of that article, marked "Exhibit A", is attached hereto and made a part of this argument.

In passing upon constitutional questions, this Court will decide for itself what the contract was, and whether or not it is ambiguous, *Appleby* v. *New York*, 271 U. S. 364, 379-380, 70 L. Ed. 992, 999. Let us examine the instrument which appears in the record (R. 30-34). The contract provided that R. H. Locke should perform all grading and incidental culvert work in connection with the reduction of curves at certain locations on the main line of the Railway Company (R. 31). The contract specified the rates or prices to be paid (R. 31), provided that the Railway's Engineer, promptly after the first of each month, should estimate the work done and determine the amount due Locke, and that the Railway Company thereupon should pay Locke the amount of such estimate, less previous payments and less fifteen per cent (R. 31-32). And paragraph 6 of the contract provided that,—

> "Upon completion of the work herein provided, the Chief Engineer shall have an inspection made and if the work is complete and satisfactory, a final statement of all the work done and moneys due the Contractor shall be made by the Railway Engineer, whereupon, *after the Contractor has furnished written evidence satisfactory to the Railway, that he has paid in*

> *full all amounts that may be due by him to any and all persons who may have performed labor or furnished materials or supplies to the Contractor in connection with the work to be done hereunder, the Railway shall pay to the Contractor the full amount earned under this contract, less payments previously made,* as soon as final statement can be audited and passed for voucher in the course of the Railway's business" (our italics) (R. 32).

The Bank became the assignee of Locke (R. 35) but it is not contended by the majority opinion that the Bank acquired any greater rights than Locke had.

After completion of the work, the Railway owed Locke a balance of $2,259.11 (R. 44), subject to the provisions of paragraph 6 of the contract. The Bank demanded this entire amount (R. 42-43) which the Railway Company refused to pay because it had notice of outstanding claims against Locke for material and supplies (R. 39-40, 41, 61-62) and because the Railway Company had not been furnished with written evidence satisfactory to it that Locke had paid in full all amounts due by him to any and all persons who performed labor or furnished materials or supplies in connection with the work done by him under the contract (R. 62). It is admitted in the majority opinion that such bills were never paid (R. 129).

In our view it is too plain for argument that there is nothing ambiguous about the contract and in this we are supported by the Court of Civil Appeals for the Eleventh District of Texas, which declared that "the contract is unambiguous" (R. 69), and by the dissenting opinion of Supreme Court Justice Sharp who said:

> "If there is ambiguity whatever in the language employed by the parties, I have been unable to detect it; and the majority opinion does not point out wherein it lies" (R. 137).

If this Court finds, as we think it will, that there was no ambiguity in this contract, then it was and is the simple duty of the State court to enforce it as written, and its refusal to do so was arbitrary action which deprived the Railway Company of its liberty and property without due process of law, contrary to and in violation of Section 1 of the 14th Amendment to the Constitution of the United States. The dissenting Justice thought the action arbitrary and beyond the power of the State Supreme Court, for he said:

> "Could language be plainer, simpler, and more easy of understanding than the language of paragraph 6 above quoted? The majority opinion, to my mind assumes the issues which we must decide" (R. 137).
>
> * * * * * * *
>
> "* * * conceding for the purpose of this opinion, that the contract was made for the benefit of the railway company alone, I ask what benefit? The majority opinion assumes the answer to that question in this language: '* * * it is evident that the provision was embraced in the contract only to protect the railway against liens which might attach to the fund retained by virtue of our applicable lien statutes.' What right have we to make that assumption? The majority opinion does not point out the 'applicable lien statutes.' Presumably the reference was intended to be Article 5452 et seq., R. C. S. 1925. To my mind one insuperable barrier to the conclusion of the majority is the very material difference between the language of Article 5452 and that employed in paragraph 6 above. The parties to this contract provided for retaining a part of the amount to be paid until evidence was furnished that payment had been made 'to any and all persons who may have performed labor or furnished materials or supplies to the contractor in connection with the work.' The statute clearly gives no lien for supplies, and to assume that the parties intended to protect from

a lien when no lien was possible would hardly be warranted.

"But, be that as it may, and disregarding this apparent barrier, while still assuming that the provision was made for the benefit of the railway company alone, we return to the question, what benefit? Has a court the right to tell parties, contrary to their own construction of their own unambiguous language, that they meant certain unexpressed benefits and no others?" (R. 137-138).

* * * * * * *

"* * * after all, we get back to the simple, fundamental principle with which we started. It is not for the courts to make contracts between parties, and tell them what they meant by the use of clear unambiguous language. Regardless of why the parties put this provision in the contract, the fact remains that it is there and that it violates no law or public policy; and it is my view that our limited duty is to enforce it as it is written" (R. 139).

* * * * * * *

"It is unquestioned that the parties had the right to make the foregoing contract. This being so, they had the right to require its fulfillment. It is not the policy of the law to bestow a right without furnishing a remedy for its enforcement" (R. 140).

As stated in the dissent (R. 137), the majority opinion does not point out any ambiguity in the contract, and admits (R. 131) that "courts do not resort to arbitrary rules of construction where the intention of the parties is clearly expressed in unambiguous language", citing *Magnolia Petroleum Co.* v. *Connellee,* 11 S. W. (2d) 158, a case in which the Supreme Court of Texas adopted an opinion written by the Commission of Appeals of Texas, Section B, wherein it was said:

"There are some rules applicable for the construction of written contracts, for the purpose of ascertain-

ing from the language used the manner and extent to which the parties intended to be bound. Courts, however, are not permitted to resort to arbitrary rules of construction where the intention of the parties is expressed in clear and unambiguous language * * * but will enforce the contract according to its terms * * *" (11 S. W. (2d) 159).

The majority opinion has not specified any ambiguity in this contract, hence the failure of the court below to apply these clearly expressed principles of law in this case is further evidence of its arbitrary action.

Not having any ambiguity to point out, the majority opinion falls back upon the pure assumption that paragraph 6 was placed in the contract "only to protect the Railway against those who might claim liens against it under our (Texas) lien statutes pertaining to railroads" (R. 132). As shown in the dissenting opinion, the Court has no right to make this assumption (R. 137), "to tell the parties, contrary to their own construction of their own unambiguous language, that they meant certain unexpressed benefits and no others" (R. 138), to "tell them what they meant by the use of clear unambiguous language" (R. 139), and "to make contracts between the parties" (R. 139). But the majority opinion has done these things and it has changed a contract requiring that "*all* persons" shall be paid, into one which requires only that persons filing liens shall be paid. Under that opinion the contract is just as surely changed and restricted in its operation and effect as if the Court had written bodily into the contract the italicized language appearing at the end of the following quotation from paragraph 6:

> "* * * after the Contractor has furnished written evidence satisfactory to the Railway, that he has paid in full all amounts that may be due by him to any and all persons who may have performed labor or furnished

materials or supplies to the Contractor'' *and who have filed liens against the Railway.*

There is no justification in the lien statutes of Texas for this arbitrary action, and the majority opinion points to none. Those statutes, *Articles 5452* to *Article 5472c*, Vernon's Revised Civil Statutes of Texas, Chapter 2 of Title 90, affecting mechanics, contractors and materialmen, sets forth the conditions under which liens may be fixed, but it is expressly stated in *Article 5468* that ''nothing in this law shall in any manner affect the contract between the owner and original contractor as to the amount, manner or time of payment of said contract price.'' Accordingly, the parties contracted that Locke would be paid *after* he had furnished the Railway Company with written evidence satisfactory to it that he had paid ''*all* persons'' performing labor or furnishing materials or supplies (R. 32). The assumption of the majority opinion that the parties intended ''only to protect the Railway against those who might claim liens against it under our (Texas) lien statutes pertaining to railroads'' (R. 132) not only is unwarranted but is pure arbitrary action.

The arbitrary attitude of the court below also is evidenced by its use of *obiter dicta* found in *Getty et al.* v. *Penn. Inst. etc.*, 194 Pa. 571, 45 Atl. 333, to bolster its refusal to enforce the contract as made. This was pointed out in a second motion for rehearing which was presented by the Railway Company to the court below and by it returned unfiled.

And the apparent determination of the court not to enforce the contract which the parties made is further evidenced by its refusal to remand the case, as suggested by the Railway Company (R. 148), so that it might prove the facts showing the real intention of the parties at the time the contract was made, namely, that all persons performing

labor or furnishing materials or supplies should be paid whether liens were filed or not.

Frankly, we do not understand the court's attitude for, as stated in the dissenting opinion, it seems to us "altogether commendable * * * to make provision that persons who furnish labor and material * * * should be paid" (R. 138), and if a "company desires to do that, why should courts prevent it?" (R. 139). Such action certainly is contrary to the general rule that "competent persons shall have the utmost liberty of contracting" and "their agreements voluntarily and fairly made shall be held valid and enforced in the courts", *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 356, 75 L. Ed. 1112, 1116.

Wherefore, it is respectfully submitted that the petition for writ of certiorari should be granted and that upon final hearing the judgment of the Supreme Court of Texas should be reversed.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By WAGSTAFF, HARWELL, DOUTHIT & ALIVS,
Abilene, Texas.

R. S. SHAPARD,
S. W. LANCASTER,
M. E. CLINTON,
Texas and Pacific Bldg.,
Dallas, Texas,
Counsel for Petitioner.

Frank Parrott, M. M. Dawson and K. A. Browning doing business as a co-partnership under the trade name of F. C. Crane Company, and Fort Worth Sand & Gravel Company, a Texas corporation, hereby adopt the foregoing brief in support of the petition for writ of certiorari.

GUTHRIE & GUTHRIE,
R. L. GUTHRIE,
Counsel for the above mentioned parties,
Petitioners.

EXHIBIT "A".

Texas Law Review.

June, 1941.

Pages 509-510.

Contracts—Third Party Beneficiaries—Conditions Precedent.—Locke contracted to do grading and culvert work for the defendant railway. The contract provided that out of the balance owed to the contractor each month the defendant would retain fifteen per cent, which should constitute a final payment, to be made after the contractor had furnished proof that he had paid in full all materialmen. The construction job having been completed, the bank, assignee of Locke, sued the railway for the fund retained; and unpaid materialmen intervened, claiming a right to be paid out of the fund on the ground that they were third party beneficiaries of the contract between the railway and Locke. *Held,* that the contract was not a third-party-beneficiary contract but was made solely for the benefit of the railway; and that the bank could recover against the railway without performance of the condition, which would be of no benefit to the railway since the time for fixing materialmen's liens had passed. Citizens National Bank of Abilene *v.* Texas & Pacific Ry., 9 Tex. Sup. Ct. Reporter, 246 (March 22, 1941).

In Texas, as in most jurisdictions, the right of recovery by a third-party-beneficiary is well settled. Allen *v.* Traylor, 212 S. W. 945 (Tex. Comm. App. 1919); Employers Casualty Co. *v.* Ponton, 41 S. W. (2d) 147 (Tex. Civ. App. 1931); Aetna Ins Co. *v.* Texarkana National Bank, 60 S. W. (2d) 251 (Tex. Civ. App. 1933, writ of error dism'd). In a suit involving the claim of a third-party-beneficiary it is ordinarily clear that a promise has been made, and the controversy arises over whether the promise was intended for the benefit of the third-party-beneficiary. Banker *v.* Breaux, 133 Tex. 183, 128 S. W. (2d) 23 (1939), (1939) 18 Texas Law Review 84. Both the majority and dissenting opinions of the principal case recognized the difficulty in

finding any promise to pay materialmen, proof of such payment being stated as a condition. Moreover the usual suit is against the promisor, whereas in the principal case, even if a promise to perform the condition be implied, the railway, against whom the interveners ask judgment, would be the promisee. See (1939) 18 Texas Law Review 85. Thus it would seem that the majority was correct in refusing recovery against the railway on the theory of a third-party-beneficiary contract, and the railway might waive the condition and pay the bank without incurring any liability to the materialmen.

A more difficult problem is presented by the court's decision that the bank could recover against the railway without performing the condition precedent. As a general rule conditions precedent must be exactly fulfilled or no liability can arise on the promise which such conditions qualify. 3 Williston, Contracts (rev. ed. 1936), § 675. The fact that non-performance of the conditions has caused no injury to the promisor is immaterial. Jungmann & Co. *v.* Atterbury Bros., 249 N. Y. 119, 163 N. E. 123 (1928). Though a condition precedent has confessedly not been performed recovery is allowed on the contract itself when the consequences of enforcement of the condition would result in severe forfeiture. 3 Williston, Contracts, § 793. This proposition was applied in Fountain *v.* Stein, 97 Conn. 619, 118 Atl. 47 (1922), as there performance of the condition precedent had become impossible. The principal case is not analogous, for, by paying the interveners, the bank can become entitled to judgment against the railway and thereby avoid forfeiture. In the principal case the court concludes that the railway must pay the bank, assignee of the contractor, without performance of the condition, since performance thereof would be of no benefit to the railway. The court relies on a clear statement to that effect in Getty *v.* Pennsylvania Institution for Instruction of the Blind, 194 Pa. 571, 45 Atl. 333 (1900). But such statement is *dictum*, for neither the contractor nor his assignee was a party to the suit, the materialmen alone having sued. A search of the authorities has revealed no other case holding that a condition precedent is waived merely because performance of

the condition will not benefit the party insisting upon it. Moreover, in the principal case it is arguable that performance of the condition will benefit the railway in the maintenance of its good will. It should be immaterial whether the railway insists on performance of the condition for the same reason that it insisted upon inclusion of the condition in the contract. It would seem that the railway acted within its rights in demanding performance of the condition, and the railway should be allowed to insist upon judgment that the bank take nothing until it furnished proof of payment to the materialmen.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 511.

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Petitioners,

v.

THE CITIZENS NATIONAL BANK IN ABILENE.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANT OF CERTIORARI.

TOM K. EPLEN,
PAUL E. LESH,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE CITIZENS NATIONAL BANK IN ABILENE.

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANT OF CERTIORARI.

No Writ of Certiorari should be granted in this case because: (1) No federal question is involved; (2) If there were, it was not timely raised in the state court; and (3) The judgment rendered by the Supreme Court of Texas was a correct one.

ARGUMENT UNDER FIRST AND SECOND POINTS.

As exemplified by the opinion of the Supreme Court of Texas (R. 127), this case turned solely on the construction given the 6th Paragraph of the construction contract (R. 32), which recited in substance that the contractor should be paid in full when he had furnished written evidence that he had paid all construction bills. In the trial court the materialmen relied only on asserted liens (see their pleadings—R. 6, 10, 13). The Railway answered only (R. 24) that such paragraph created a condition precedent render-

ing the Bank's action premature. The decision of the Court of Civil Appeals turned solely on the construction of the contract (R. 68). No contention was made by any party that a federal question was involved, prior to the Motion for Rehearing by the Railway in the Supreme Court of Texas (R. 143). It now cites *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641, to support its contention that the state court's majority opinion represents "arbitrary and capricious" exercise of power, but the same case holds that even if such opinion was erroneous, it does not deprive the Railway of any rights under the due process clause of the Federal Constitution. No authorities presenting analogous facts are presented by Petitioners. If Respondent correctly interprets them, the following authorities clearly indicate that no federal question is presented in the instant case, and that the attempt to raise same in the Motion for Rehearing is insufficient: *Herndon* v. *Georgia*, 295 U. S. 441-443, 79 L. Ed. 1530, 1532; Annotation 79 L. Ed. 1539, 1541; —— U. S. C. A., Title 28, Sec. 344, Note 49, page 231. The grounds upon which the state court decided this case are clear, with no uncertainty involved, and as we understand, this Court should decline to review on certiorari under the rule announced in *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 555, 84 L. Ed. 920, 923; and authorities collated in Annotation 84 L. Ed. 925.

ARGUMENT UNDER THIRD POINT.

The Supreme Court of Texas rendered a correct judgment. It has been held before that such contractual provisions inure solely to the benefit of the owner and vest no rights in third parties. 40 C. J. 365, Sec. 500; *Getty* v. *Pennsylvania Institution* * * *, 194 Pa. 571, 45 Atl. 333; *In Re H. A. Moore Co., Inc.*, 31 F. (2) 321; *Southern Surety Co.* v. *Bering Mfg. Co.*, 295 S. W. 337, Texas—Galveston Ct. Civ. Apps. Petitioners cite no authorities to the contrary Subject contract did not authorize the Railway to utilize the retained fund *to pay materialmen provided the*

contractor so defaulted, as was true in such cases as *Central State Bank* v. *U. S. F. & G. Company, Et Al.,* 9 F. (2d) 326.

Under the Texas law the assignment by the contrator to Respondent Bank, approved by the Railway, vested legal title in the Bank as to all monies due the contractor, so soon as earned. *Clay-Butler Lumber Co.* v. *W. H. Pickering Lumber Co.,* 276 S. W. 664; *City National Bank of Beaumont* v. *American Surety Co. of New York,* 52 S. W. (2d) 259. The majority opinion (R. 127) clearly proceeds on the theory that subject contract is without ambiguity, Petitioners' implications to the contrary notwithstanding. Justice Sharp, in his dissent (R. 134), admits that he does not consider that the instant contract vested any rights in the materialment which they could enforce themselves (R. 139). He cites no authorities to sustain his view, and his theory of permitting a third party beneficiary to recover when vested with no right of action by the contract, suggests a new and novel theory in contract law. The materialmen had the right under the Texas statutes to fix liens, taking priority over the Bank's assignment, but they admittedly perfected none. The Railway got everything it contracted for in this case, for which it owed money, and the Texas Supreme Court concluded that the contractual provision, for the sole protection of the Railway, had served its purpose; that the Railway should not be permitted to keep the money itself, and that Respondent Bank was entitled to the fund under its assignment because Intervenors failed to perfect any lien, and the contract vested no rights in them. We submit that such conclusion was the only sound and logical one to be reached, and the decision was a correct one.

It is therefore respectfully submitted that this case is not a proper one for review in this Court and that the Petition for Writ of Certiorari should be denied.

Tom K. Eplen,
Paul E. Lesh,
Counsel for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1941

No. 511

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Petitioners,

vs.

THE CITIZENS NATIONAL BANK IN ABILENE,
Respondent.

REPLY TO BRIEF OF RESPONDENT

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Supreme Court of the United States
OCTOBER TERM, 1941

No. 511

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Petitioners,

vs.

THE CITIZENS NATIONAL BANK IN ABILENE,
Respondent.

REPLY TO BRIEF OF RESPONDENT

To the Honorable the Supreme Court of the United States:

Denial of the petition for writ of certiorari is sought upon three grounds, namely: (1) no federal question is involved; (2) if it were, it was not timely raised in the state court; and (3) the judgment rendered by the Supreme Court of Texas was a correct one.

A Federal Question Is Involved

This is not a case of mere erroneous decision. It is a case of arbitrary action; hence the federal question under the due process clause of the 14th Amendment.

The Texas and Pacific Railway Company and R. H. Locke entered into a simple unambiguous contract under which Locke was required to pay *all* persons furnishing labor or materials and supplies on the contract job, whether liens were filed or not (R. 30, 32). Under a majority

opinion, the Texas Supreme Court has arbitrarily changed the contract and excused Locke from paying such parties because they did not file liens against the Railway Company. Such action, we say, violates the due process clause of the 14th Amendment, *Muhlker v. New York & H. R. Co., 197 U. S. 544, 570, 49 L. ed. 872, 878, Postal Tel.-Cable Co. v. Newport, 247 U. S. 464, 473, 62 L. ed. 1215, 1220,* and it "is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' ", *American Railway Exp. Co. v. Kentucky, 278 U. S. 269, 273, 71 L. ed 639, 641.*

Regardless of what the Texas Supreme Court has said, this Court will determine for itself whether the contract is ambiguous, and its proper construction and effect, *Appleby v. New York, 271 U. S. 364, 379-380, 70 L. ed. 992, 999.* Upon such investigation, we are certain this Court will find, as did the Texas Court of Civil Appeals (R. 69) and the dissenting Texas Supreme Court Justice (R. 137), that there is no ambiguity in the contract; that it violates no law or public policy (R. 139), and that it is the duty of the courts to enforce it as written (R. 139). Such holding would be in accord with this Court's declaration that "competent persons shall have the utmost liberty of contracting" and "their agreements voluntarily and fairly made shall be held valid and enforced in the courts", *Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 356, 75 L. ed. 1112, 1116.*

The 14th Amendment declares that "No State shall * * * deprive any person of life, liberty, or property without due process of law * * *". Respondent ignores this constitution-

al provision as well as the following decisions relating thereto:

The "right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution", *Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566, 55 L. ed. 328, 338; Allgeyer v. State of Louisiana, 165 U. S. 578, 589-590, 41 L. ed. 832, 835-836.*

The 14th Amendment to the Federal Constitution "governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers' " and "upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution", *Mooney v. Holohan, 294 U. S. 103, 113, 79 L. ed. 791, 794.*

"The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' ", *Brown v. Mississippi, 297 U. S. 278, 286, 80 L. ed. 682, 687.*

The power of a state court "cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States", *Muhlker v. New York & H. R. Co., 197 U. S. 544, 570, 49 L. ed. 872, 878.*

The existence of a substantial federal question in this case is clearly disclosed by the application of these principles.

The Federal Question Was Timely Raised

There is no merit to Respondent's contention that the federal question was not timely raised.

Prior to the decision of the Texas Supreme Court in the instant case, the law in Texas was:

> "So long as no statute is infringed" parties may "bind themselves to each other as they see fit, with respect to obligations imposed by the contract", *Reef v. Mills Novelty Co. (Com. App., Sec. A; opinion adopted by Supreme Court), 89 S. W. (2d) 210, 211.*
>
> "Terms of contract free from ambiguity and not against the policy of the law to enforce establish the right of the parties thereto", *Burns v. American Nat. Ins. Co. (Com. App., Sec. B; opinion adopted by Supreme Court), 280 S. W. 762, 765.*
>
> "There are some rules applicable for the construction of written contracts, for the purpose of ascertaining from the language used the manner and extent to which the parties intended to be bound. Courts, however, are not permitted to resort to arbitrary rules of construction where the intention of the parties is expressed in clear and unambiguous language * * * but will enforce the contract according to its terms * * *. As is well said by Chief Justice Cureton in Texas Farm Bureau Cotton Ass'n v. Stovall, 113 Tex. 273, 253 S. W. 1101: 'The primary test of the character of a contract is the parties' intention as manifested by its terms' ", *Magnolia Petroleum Co. v. Connellee (Com. App., Sec. B; opinion adopted by Supreme Court), 11 S. W. (2d) 158, 159.*
>
> "A 'condition precedent' is such as must happen or be performed before a right can accrue to enforce an obligation dependent upon the happening or performance thereof against another in favor of one claiming such right", *Burns v. American Nat. Ins. Co. (Com. App., Sec. B; opinion adopted by Supreme Court), 280 S. W. (2d) 762, 765.*
>
> "It is quite elementary that an instrument payable upon a condition which does not import an absolute

liability is not payable until that condition has happened", *Ferguson v. Mansfield (Sup. Ct.), 263 S. W. 894, 900.*

"We are not prepared to hold that the railroad company might not have required of the contractors a bond binding them and sureties to pay all debts contracted with persons for labor, material or other things necessary to the performance of the contract, whether the claims might be asserted against the railroad company's property as a lien or not * * *", *National Bank v. G. C. & S. F. Ry. Co. (Sup. Ct.), 95 Texas 176, 184, 66 S. W. 203, 205.*

"The contention that Roddy (the owner), by accepting the assignment to the bank and promising to pay to the bank, at maturity, the final installment of the note, became unconditionally bound to pay said sum to the bank, cannot be sustained. The acceptance and promise imports nothing more than that said portion of the note would be paid according to the terms of the building contract and of the note itself. As already shown, payment of this part of the note depends partly on satisfactory proof being furnished Roddy, or the architect, that all bills for labor and material have been paid. The bank took the note subject to the right of the Roddys and of the insurance company to apply, or have applied, the $20,000 installment of the note to the purposes for which such fund was created, which included payment of claims for labor and material" *American Employers' Ins. Co. v. Roddy (Com. App., Sec. A; opinion adopted by Supreme Court), 51 S. W. (2d) 280, 284.*

In light of this settled law in Texas, it cannot be said that petitioner should have anticipated that the Texas Supreme Court would refuse to enforce and would change by construction this plain unambiguous contract in violation of the 14th Amendment and contrary to this Court's declaration that the power of a state court "cannot be ex-

ercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States", *Muhlker v. New York & H. R. Co., 197 U. S. 544, 570, 49 L. ed. 872, 878.* As soon as the arbitrary action of the Texas Supreme Court was made known by the filing of its opinion (R. 127), petitioner raised the federal questions by motion for rehearing (R. 143) which is a matter of right under Texas law (petition for certiorari, pages 17-18). Filing of the motion prevented the judgment of the Supreme Court from becoming final, *Article 1772, Vernon's Revised Civil Statutes of Texas, 1925.* By overruling the motion for rehearing "after due consideration of same" (R. 163), the Supreme Court of Texas denied the asserted federal rights.

This case clearly falls within the principles announced in the following cases:

A federal claim is timely "if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it", *Herndon v. Georgia, 295 U. S. 441, 444, 79 L. ed. 1530, 1533; Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 677-678, 74 L. ed. 1107, 1112; Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320, 74 L. ed. 870, 876.*

"When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect", *Norris v. Alabama, 294 U. S. 587, 590, 79 L. ed. 1074, 1077.*

State courts shall "not be the final arbiters of important issues under the Federal Constitution", *Minnesota v. National Tea Co., 309 U. S. 551, 557, 84 L. ed. 920, 924.*

The Judgment Violates Constitutional Rights

The contracting parties intended, by their own simple unambiguous language, that *all* persons furnishing labor, materials and supplies should be paid. As stated by the dissenting Supreme Court Justice, this is "natural and altogether commendable" (R. 138), and if the parties desire to do that, "why should the courts prevent it?" (R. 139). But the judgment of the Texas Supreme Court has prevented it, and these parties must go unpaid because that Court arbitrarily has refused to enforce the contract as written and has forced upon the parties a contract which they did not make, contrary to and in violation of the 14th Amendment.

We respectfully submit that this Court should exercise its primary function of "safe-guarding the liberty of the citizen against deprivation through the action of the State", *Mooney v. Holohan, 294 U. S. 103, 112, 79 L. ed. 791, 794,* and that it should review and "make such disposition of the case as justice requires", *Minnesota v. National Tea Co., 309 U. S. 551, 555, 84 L. ed. 920, 923; Patterson v. Alabama, 294 U. S. 600, 603, 79 L. ed. 1082, 1083-1084.*

Respectfully submitted,

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Frank Parrott, M. M. Dawson and K. A. Browning doing business as a co-partnership under the trade name of F. C. Crane Company, and Fort Worth Sand & Gravel Company, a Texas corporation, hereby adopt the foregoing reply brief.

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